

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/04/2003

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 1923 of 1991

T. Subramania Nadar ... Appellant

-Vs-

1. T. Varadharajan
2. T. Thirumoorthy ... Respondents

Appeal under Section 100 CPC against the Decree and Judgment dated 24-10-1991 made in A.S. No. 138 of 1989 on the file of Subordinate Judge, Gobichettipalayam reversing the Judgment and Decree dated 22-11-1989 passed in O.S. No. 229 of 1987 on the file of Principal District Munsif Court, Gobichettipalayam.

!For Appellant : Mr. C. Selvaraju

^For Respondents : Mr. A.K. Kumarasamy

:JUDGMENT

The Plaintiff is the appellant, who has filed the suit O.S. No. 229 of 1987 before the Principal District Munsif Court, Gobichettipalayam for the relief of Declaration and for permanent injunction. The suit was decreed as prayed for. On appeal by the respondents before the Sub-court, Gobichettipalayam, the Decree and Judgment passed by the trial court was set aside, hence this second appeal.

2. The case of the appellant is as follows:-

The appellant and the respondents are sons of Thavasi Nadar. The said Thavasi Nadar had three wife. The appellant was born through the second wife and the respondents are the sons born through the third wife. The appellant's grand father namely Veerappa Nadar had executed a settlement deed dated 26-03-1949 thereby settled the property to the Plaintiff and appointed Thavasi Nadar as guardian. The said Thavasi Nadar discharged himself from the guardianship in the year 1968 as the appellant had attained majority. Ever since 1968, the appellant is in exclusive possession and enjoyment of the suit property by paying taxes and charges to the authorities. The respondents were born only after 1968. After 1968, partitions were took place between the

appellant and respondents excluding the suit property. Except the appellant, nobody has any right over the suit property. The respondents attempted to evict the appellant by illegal means, hence the suit has been filed.

3. The case of the respondents is as follows:-

The respondents are entitled to equal share on par with the appellant as per the settlement deed dated 26-03-1949 since the settlor has categorically stated that the appellant and grand son to be born to Thavasi Nadar are entitled to equal share in the property. The respondents are co-owners of the suit property and they are in joint possession and enjoyment of the suit property. During 1973-1974, some of the properties covered in the said settlement deed were jointly sold by the appellant and respondents. On 07-10-1968, the appellant and 1 st respondent have partitioned the property comprised in Survey No.255 /A. After ten years, the appellant and respondents entered into oral partition of the suit property in the presence of Panchayatars. Consequently, the respondents have been in possession and enjoyment of 2 /3rd share in the suit property. The plea of adverse possession set up by the appellant is not correct.

4. Before the trial court, the appellant marked Exs. A1 to A21 and examined himself as PW1 and one Makaliappan as PW2. The respondents have marked Exs. B1 to B5 and the first respondent examined himself as DW1 and one Krishnan and Palanisamy Gounder as DW2 and DW3 respectively.

5. The trial court found that at the time when the settlement deed was executed, the mother of the respondents was not married to Thavasi Nadar and the respondents have born subsequently. The appellant was only grand son at the time of execution of the settlement deed. As per the settlement deed, the property devolves on the grand son or sons born through the second wife of Thavasi Nadar, hence the respondents are not entitled to any share in the suit property and decreed the suit as prayed for.

6. On appeal by the respondents, the First Appellate Court reversed the finding of the trial court holding that the trial court misconstrued the conditions contained under Ex.A1 and all sons born through Thavasi Nadar are entitled to the suit property.

7. This second appeal has been admitted on the below mentioned substantial questions of law:-

i) Whether the judgment of the lower Appellate Court is correct in holding that as per the settlement the respondents have got title over the property?

ii) Whether the respondents are entitled to claim any share over the property on the basis of settlement Ex.A1 when they have not born at the time of the settlement deed?

iii) Can the settlement be made in favour of an unborn person?

8. Mr. Selvaraju, learned counsel appearing for the appellant submitted that the first Appellate Court ought not to have held that by virtue of the settlement all the grandsons are entitled to a share in the suit property including the person or persons who were not born; that the first Appellate Court failed to note that the appellant herein has perfected his title by adverse possession as he was exclusively enjoying the property for more than the period prescribed under law with the knowledge of the defendant. It is further submitted by the learned counsel that no settlement could be effected in favour of a non-existing person and therefore the respondents have no right over the property and prayed for setting aside the Decree and Judgment made by the lower Appellate Court.

9. The learned counsel appearing for the appellant relied on the following decisions in support of his case.

i) Raj Bajrang Bahadur Singh Vs. Thakurain Bakhtraj Kuer [AIR 1953 Supreme Court 7] wherein in Para-14 it was held thus:-

"14. Of course this by itself gives no comfort to the defendant; she has to establish, in order that she may be able to resist the plaintiff's claim, that the will created an independent interest in her favour following the death of Dhaj Singh. As we have said already, the testator intend to create successive life estates in favour of the successive heirs of Dhuj Singh. This, it is contended by the appellant is not permissible in law and he relies on the case of Tagore Vs. Tagore, 18 WR 359. It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons, who are in existence, at the time of the testator's death and is invalid as to the rest. The widow, who is the next heir of Dhuj Singh, was in existence when the testator died and the life interest created in her favour should certainly take effect. She thus, acquired under the will an interest in the suit properties after the death of her husband, commensurate with the period of her own natural life and the plaintiff consequently has no present right to possession."

In this case, the testator executed a will. The beneficiaries under the will were his younger son and his heirs in succession. The testator has created successive life estate in favour of the successive heir of his younger son. The other side relies on the case of Tagore Vs. Tagore - 18 WR 359 wherein it is held that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to persons who are in existence at the time of testators death and is invalid as to the rest. The Honourable Supreme Court, after consideration of the facts and circumstance of the case held that the widow of the next heir of younger son was in existence when the testator died and the life interest created in her favour should certainly take effect. Ultimately, the appeal was dismissed.

ii) Madhavarao Ganpatrao Desai and others Vs. Balabhai Raghunath

Agaskar and others A.I.R. 1928 Privy Council 33 wherein it was held thus:-

"Their Lordships are of opinion, that the true interpretation is that the persons who answer the description is male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, but that by operation of the Hindu law there would be excluded from that class people who were not living when the deed was executed....."

In this case, a family trust was created under a trust deed dated 01-04-1931. The Official Trustee of Bengal has been made a Trustee and the property was conveyed to the Trustee to be held by him upon trust set out in the said indenture. The said Trust was created for the benefit of settlor and the wife, his sons and their children to be born at the date of Trust. The Settlor's family consist of his wife and his three sons. None of these three sons were married. These three sons were to have, after the death of the settlor and his wife interest in equal share in the subject matter of the Trust absolutely provided that the share of each one of the sons would be settled to the Trust in favour of the grand children created in subsequent clauses. It was provided that during the life time of each one of the sons of the settlor, the Trustee will pay them 1/3rd of income after meeting expenses and thereafter the Trustee would make over the property to the children of such one sons and if no sons to be born to them or after the birth of the son or the daughter, as the case may be do not attain the age of majority or married, the portion of the property allotted to each one of the sons would revert back to the Settlor's estate so as to be divisible among other beneficiaries. The Court held that the bequest being not a whole of the interest of the testator, the bequest must be held to be void.

iii) Issac Nissim Silas and others Vs. Official Trustee of Bengal
□ AIR 1957 Calcutta 118 wherein it was held in Para-6 and 7 as follows:-

"6. The legality of the gift in favour of the grand-sons has been questioned by Mr. Meyer appearing for the plaintiffs on two grounds. In the first place, it is stated that the settlor purported to make a gift of the estate to his sons after the death of himself and his wife, that is, he purported to make a gift of the remainder to the sons absolutely. It was said that subsequent interest purported to be created in favour of the grand-children would be inconsistent with the absolute interest given to the sons and as such the trust in favour of the grand-children must be held to get the remainder of the property under the deed absolutely. In the second place, it has been argued that the gifts in favour of the grand-children must be held to be void and the sons must be held to get the remainder of the property under the deed absolutely. In the second place, it has been argued that the gifts in favour of the grand-children are bad inasmuch as the entire interest of the remainder has not been given to the grandchildren. The gift in favour of the grand-children is a contingent gift and is to take effect subject to two contingencies, namely, that the legatees, that is, the grand-children must survive the named persons, and must also attain a particular age. Hence the gift of the corpus of the grand-children are subject to double contingencies and under Sec. 13 of the Transfer of Property Act such a gift in favour of unborn persons is bad in law....."

7. He submitted therefore that the trusts in favour of the grand children in the Deed of Trust must be held to be void. I agree with this submission of Mr. Meyer and hold that the trust in favour of the grand-children is bad in law. In the view that I have taken it is not necessary for me to consider the other argument put forward by Mr. Meyer viz., that after making a gift of the remainder to his sons absolutely the subsequent trust in favour of grand children amount to curtailment of such absolute gift.."

In this case, the testator made a voluntary settlement in favour of his children and grand children. The children were four, amongst whom was Krishna Bai, one of his daughters. The settlement in relation to her provide "as to one quarter of the said rents, dividends and profits upon trust to pay the same to my daughter Krishna Bai during her life for the sole and separate use and after her death for the male heirs of the said Krishna Bai's share and share alike." The settlor died and then Krishna Bai died after him leaving her six sons of all of whom are living at the date of settlement . The heir of the settlor contended that the limitations in favour of her male heirs after her death were contradictory to Hindu Law and void. The Honourable Privy Council held that two interpretations of the settlor was that the person who answer the description of male heir at the time of Krishna Bai's death were present in whose favour an independent gift was made; that the male heirs of Krishna Bai did not took by inheritance from her but that by operation of Hindu Law there would be excluded from that class of people who were living when the deed was executed and that the estate confers on such persons was an absolute estate.

10. Mr. A.K. Kumarasamy, learned counsel appearing for the respondents submitted that the settlement deed executed by the grand father of the respondents is perfectly valid and the respondents are entitled to equal share on par with appellant in the suit property. The learned counsel further submitted that the first Appellate Court, after careful consideration of material evidence and also proposition of Law has rightly set aside the decree and judgment passed by the trial court, hence no interference of this Court is warranted.

11. Now, we look into the relevant provisions of Transfer of Property Act and The Indian Succession Act which runs as follows:-

Transfer of Property Act

Section 13 - Transfer of benefit of unborn person:-

"Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."

The Indian Succession Act

Section 113. Bequest to person not in existence at testator's death subject

to prior bequest

"Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed."

12. Under Section 13 of Transfer of Property Act transfer cannot be made directly to an unborn person as the definition of transfer in Section 5 of Transfer of Property Act is limited to living persons. The transfer in favour of an unborn person can be made by a machinery. It is intended to express this distinction by the words " for the benefit of " the trustees being the transferees who hold the property for the benefit of the unborn persons. The estate must vest in some person between the date of the transfer and the coming into existence of the unborn person. The interest of the unborn person must therefore be in every case preceded by a prior interest. Section 13 says that the interest of the unborn person must be the whole remainder. The illustration to Section 13, that the interest created for the benefit of the unborn eldest son is only a life interest and it therefore fails.

13. Section 13 of the Transfer of Property Act is almost identical with Section 113 of Indian Succession Act, 1925. The difference between the two sections is that the former relates to transfer of inter vivos, while the latter deals with bequest which take effect only on the death of the testator. Section 113 of Indian Succession Act can come into operation only when the bequest to an unborn person is postponed by the intervention of life or some other interest in the thing bequeathed. This section has nothing to do with the postponement of possession; a failure to vest the whole remaining interest of the testator is repugnant to the section but when that is done, it has no application. Postponement of possession is not a retention of part of testator's interest and is not a fetter so as to prevent the whole of that interest being vested in the beneficiary. The expression " the whole of the remaining interest of the testator " does not mean the whole property of the testator but even a fractional interest in any property can be given to unborn person provided it is not subject to other conditions.

14. The principle underlined in Section 13 is that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more generation than one. The Rule is quite distinct from the Rule against perpetuity, though their effects sometimes overlap.

15. What is given to unborn person need not necessarily vest in him at his birth. Vesting must, however, takes place other than the limitations prescribed by Section 14. Section 14 of the Transfer of Property Act controls Section 13 of the Transfer of Property Act and as such both these sections should be read together.

16. The Law relating to transfer inter vivos or by will of

property by Hindu has been set out in Mulla's Transfer of Property Act, 1882, eighth edition. " According to pure Hindu Law, a gift or bequest in favour of an unborn person is void. But, this Rule has been modified by Statute, Madras Act 1 of 1914. The Hindu Disposition of Property Act 15 of 1916 and Act 8 of 1921 validate gifts to unborn persons. These acts have been amended by Section 11, 12 and 13 of Transfer of Property Supplementary Act 21 of 1929 and amendments enact that subject to the limitations in Chapter II of Transfer of Property Act and Sections 113, 114, 115 and 116 of Indian Succession Act, 1925, no transfer inter vivos or by will of property by a Hindu shall be invalid and by reason only that any person for whose benefit it may have been made was not born at the date of such dispositions. The omission of the word Hindu in Section 2 makes this section directly applicable to Hindus. "

16. The effect of these enactments is that a gift can be made to an unborn person subject to the following conditions (i) that the gift shall be of the whole of the remaining interest of the testator in the thing bequeathed and not of a limited interest; and (ii) that the vesting is not postponed beyond the life in being and 18 years, being the rule against perpetuities as laid down in Section 114.

17. In the case on hand, the grand father of the appellant and the respondents executed a settlement deed dated 26-03-1949 under Ex.A1 wherein he categorically stated that

" //// vd;trk; ,Uf;Fk; Rahh;\$pj brhe;jkhd fPnH tpthpf;fg;gl;l
brhj;Jf;f]s vdf;F nguDk;. nkW;go jtrp ehllh; kFDkhd ,g;ngjhpUf;Fk; ikdh;
Rg;gpukzpaj;jpw;Fk; ,dpnky; jtrp ehllhUf;F gpwf;Fk; Mz; re;jjpf;Fk; rh;t
Rje;jpukha; nruj;jf;f] moapy; fhqk; brhj;Jf;fs; ,g;ngjH ,Uf;Fk; ikdh;
Rg;gpukz;aDk; ,dpnky; nkW;go jtrp ehllhUf;F gpwf;Fk; Mz; kf;fs; ikdh;fSk;
nk\$uhFk; tiu ikdh;fSf;F jfg;gdhh; vdf;F kFDkhd jtrp ehllh; ikdh;fSf;F
fhh;oadhf ,Ue;J brhj;Jf;f]s ahbjhU ghuhjPdKk; bra;ahky; brhj;Jf;fspypUe;J tUk;
tUkhdj;ij bfhz;L fe;jha KjyhdJk; brYj;jpf;bfhz;L ikdh;f]sa[k; rku&pj;J
tuntz;oaJ/ ikdh;fs; nk\$h; Md clnd brhj;Jf;fis mth;fsplk; xg;gilj;J tpl
ntz;oaJ/ brhj;Jf;f]sa[k; ,d;nw jtrp ehllh; trk; xg;gpj;jpUf;fjpnwd;/ "

18. From the above recital, it is seen that the appellant's grand father was fully competent to execute the settlement and he settled the properties in favour of the appellant and his unborn grand sons with absolute right and in view of the fact the possession was delivered to Thavasi Nadar, with necessary directions to deliver it to the appellant after his attainment of majority and also hold it for and on behalf of the respondents and deliver possession to them after they have attained the age of majority. Thus the respondents got the property left by their grand father as tenants in common. The deed of settlement Ex.A1 satisfy both the conditions mentioned in Para-16 supra. The judgments relied on by the learned counsel for the appellant are not applicable to the facts and circumstance of the case on hand.

19. The appellant has also raised plea of adverse possession. The first appellate Court pointed out that the part of Ex.A1 properties were sold by the appellant and the respondents represented by Thavasi Nadar under Ex.B3 and B4. Similarly some properties covered under Ex.A1 were sold by the

appellant and the respondents represented by their mother under Ex.B5. The recitals of Exs. B3, B4 and B5 show that the properties conveyed belonged to the male heirs of Thavasi Nadar. In order to establish adverse possession by one tenant in common against his co-tenants, there must be a exclusion or ouster, and the possession subsequent to that must be for the statutory period. Ouster involves not merely the act of the person ousting but the state of mind of the person ousted. No valid evidence has been placed by the appellant to establish adverse possession. The plea of adverse possession raised by the appellant was rightly rejected by the first Appellate Court. Hence, the substantial questions of law raised in this second appeal are answered against the appellant herein.

In the result, the second appeal fails, liable to be dismissed and accordingly dismissed. No costs.

16-04-2003

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Index : Yes

Internet : Yes

To

1. The Sub-Judge

Sub-Court at Gobichettipalayam

Gobichettipalayam

2. The Principal District Munsif

Principal District Munsif Court

Gobichettipalayam

3. The Records Officer

Vernacular Records Section

High Court

Madras - 600 104